

136 FERC ¶ 61,233
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

September 30, 2011

In Reply Refer To:
PacifiCorp
Docket No. ER11-4214-000

PacifiCorp
825 N.E. Multnomah
Suite 2000
Portland, OR 97232

Attention: Natalie L. Hocken, Esq.
Attorney for PacifiCorp

Dear Ms. Hocken:

1. On August 3, 2011, on behalf of PacifiCorp, you filed an Amended and Restated Interconnection Agreement (Conformed Agreement) between PacifiCorp and NV Energy, Inc. (NV Energy).¹ You state that the Conformed Agreement is intended to reinstate the terms and conditions of a 1971 agreement (1971 Agreement) between the parties for transmission and interconnection services, adding that PacifiCorp inadvertently cancelled the entire 1971 Agreement effective April 30, 2000, when PacifiCorp intended only to cancel certain power purchase provisions in the agreement.² As discussed below, we will accept the Conformed Agreement, effective October 2, 2011, as requested.

2. In the 1971 Agreement, PacifiCorp agreed to provide NV Energy with interconnection services and the use of certain of PacifiCorp's transmission facilities.³ The 1971 Agreement was amended four times: in 1977, 1985, 1991, and 1992, filed with

¹ PacifiCorp Rate Schedule FERC No. 674.

² On August 13, 2003, the Commission accepted a Notice of Cancellation of PacifiCorp Rate Schedule FERC No. 267, which became effective April 30, 2000. *See PacifiCorp*, Docket No. ER03-1020-000 (delegated letter order) (Aug. 13, 2003).

³ The 1971 Agreement was between Utah Power & Light Company (PacifiCorp's predecessor) and Sierra Pacific Power Company (NV Energy's predecessor).

the Commission, and designated as supplements to PacifiCorp Rate Schedule FERC No. 267.⁴ By letter dated April 29, 1997, NV Energy informed PacifiCorp's merchant function of its intent to cancel the power purchase provisions of the 1971 Agreement.⁵ On July 1, 2003, PacifiCorp filed with the Commission a Notice of Cancellation of PacifiCorp's entire Rate Schedule FERC No. 267, instead of just the power purchase and sale provisions indicated in NV Energy's termination notice to PacifiCorp.⁶

3. In 2008, PacifiCorp undertook a comprehensive review of the types of agreements that must be filed with the Commission, and states that a detailed description of the subsequent document review, along with PacifiCorp's mitigation efforts, are fully described in PacifiCorp's August 15, 2008 filing in Docket No. ER08-1410-000.⁷ With respect to the cancellation of Rate Schedule FERC No. 267 in particular, PacifiCorp states that it assumed the entire agreement had in fact been properly cancelled, as its review at the time did not reconcile filed service agreements and rate schedules with transmission service revenue streams.⁸ PacifiCorp did not discover the inadvertent error of cancelling the transmission and interconnection services until it prepared its 2011 transmission rate case filing. PacifiCorp claims that, having completed the reconciliation process, it is not aware of any other transmission revenues currently collected that are not appropriately associated with a service agreement or rate schedule on file with the Commission, other than this filing.⁹

4. In this filing, PacifiCorp brings the earlier arrangement for transmission and interconnection services into conformance with the requirements of both Order Nos. 614 and 714. PacifiCorp asserts that the rates, terms and conditions of the Conformed Agreement that were previously filed with and approved by the Commission remain unchanged. Consistent with the provisions of section 6.1(c) of the Conformed Agreement, PacifiCorp adds that it has continued to bill NV Energy and NV Energy has continued to pay annual fixed payments for transmission and interconnection services as

⁴ PacifiCorp Filing Letter at 1.

⁵ The parties agreed to amend the termination provision of the 1971 Agreement requiring four years' written notice because negotiations between them on terminating the power purchase provisions had begun in 1996. PacifiCorp Filing Letter at 2.

⁶ Specifically, NV Energy's notice, dated April 29, 1997, provides: "Termination of Power Purchase from PacifiCorp under the Interconnection Agreement of May 19, 1971." PacifiCorp Answer at 6 and Exhibit C.

⁷ PacifiCorp Filing Letter at 2, *PacifiCorp*, 125 FERC ¶ 61,034 (2008).

⁸ *Id.* at 2-3.

⁹ *Id.*

if the 1971 Agreement had not been cancelled. These payments are scheduled to continue for the remainder of the 45-year term of the Conformed Agreement in order to allow PacifiCorp to recover its full investment in the transmission facilities.

Additionally, because the interconnection arrangement between the parties was previously accepted and on file with the Commission (before the administrative error by PacifiCorp inadvertently terminated it), PacifiCorp states that the terms and conditions of the substantively unchanged Conformed Agreement, filed herewith as a new rate schedule, remain just and reasonable.¹⁰

5. Lastly, PacifiCorp requests waiver of the Commission's prior notice requirements in order to permit an effective date of May 1, 2000, claiming good cause exists for waiver because: (1) the transmission and interconnection provisions of the Conformed Agreement were originally filed with the Commission and remain unchanged; and (2) the error resulting in a broader cancellation than intended was inadvertent. PacifiCorp also contends that NV Energy had notice of the terms and conditions that were erroneously cancelled and continued to make payments pursuant to such terms and conditions, consistent with the notice of limited cancellation of the power purchase provisions of the Conformed Agreement.

6. Notice of PacifiCorp's filing was published in the *Federal Register*, 76 Fed. Reg. 54,756 (2011), with protests and interventions due on or before September 24, 2011. On August 24, 2011, NV Energy filed a motion to intervene and protest. On September 8, 2011, PacifiCorp filed an answer to NV Energy's protest, which prompted an answer by NV Energy, on September 19, 2011, to PacifiCorp's motion for leave to file an answer.

7. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept PacifiCorp's answer and NV Energy's answer because they have provided information that assisted us in our decision-making process.

8. NV Energy argues that the Commission should reject PacifiCorp's August 3, 2011 Filing. NV Energy claims that PacifiCorp "clearly, unambiguously and lawfully" canceled the interconnection agreement, and that the filing provides no legal justification to resurrect it.¹¹ NV Energy adds that the filing includes no evidence to contradict the notice of cancellation.¹² NV Energy argues that if PacifiCorp's new

¹⁰ *Id.* at 2.

¹¹ NV Energy Answer at 5.

¹² *Id.* at 6.

interpretation of events were true, then—at a minimum —PacifiCorp could and should have included record evidence to demonstrate that it has not recouped its transmission facility investment.¹³

9. NV Energy states that the filing provides insufficient justification to ignore the filed rate doctrine. According to NV Energy, the August 3, 2011 Filing offers no evidence supporting PacifiCorp's claims of providing jurisdictional and interconnection services after the cancellation.¹⁴ NV Energy argues that PacifiCorp unlawfully billed NV Energy, and the fact that NV Energy continued to pay annual fixed payments does not transform the unlawful invoices into a filed rate.

10. NV Energy contends that the filing provides no evidentiary support that its rate filing is just and reasonable, as required by section 205 of the FPA.¹⁵ NV Energy states that the filing does not include the supporting evidence required for an initial rate schedule required by section 35.12, or for changes to an existing rate schedule as required by section 35.13 of the Commission's regulations. According to NV Energy, the Commission has rejected a transmission provider's attempt to recover construction costs without supporting evidence under similar circumstances. NV Energy maintains that PacifiCorp cannot lawfully force NV Energy to take jurisdictional service without its consent. According to NV Energy, a public utility cannot force an entity to take a service it did not request. NV Energy adds that the Conformed Agreement simply constitutes an attempt to recover costs, and does not provide any new jurisdictional services.

11. NV Energy asserts that the Commission should reject the requested effective date of May 1, 2000 because the filing fails to demonstrate the requisite "good cause" to waive the 60-day notice requirement.

12. NV Energy requests that the Commission order PacifiCorp to provide refunds, plus interest, for the amount NV Energy has paid to PacifiCorp over the years beyond those costs allocated to NV Energy.

13. In its answer, PacifiCorp argues that the parties did not intend to terminate the interconnection portion of the agreement. PacifiCorp states that the Notice of Cancellation refers to Sierra Pacific's April 29, 1997 letter requesting termination (Termination Letter), and that the language in the Termination Letter shows that Sierra Pacific only sought to terminate certain power purchase provisions of the 1971

¹³ *Id.* at 7.

¹⁴ *Id.* at 6.

¹⁵ *Id.*

Agreement and its amendments.¹⁶ The language in the Termination Letter is consistent with a prior February 25, 1997 letter from PacifiCorp Commercial and Trading to Sierra Pacific, which provides that the parties “continue to explore proposals for modifying the terms of existing power purchase and sale obligations, with the goal of continuing Sierra’s purchases from PacifiCorp under the Interconnection Agreement dated May 19, 1971 as subsequently amended.”¹⁷

14. PacifiCorp argues that it still has to recover a significant amount of its investment in light of the cost formula set forth in Exhibit A to the Interconnection Agreement. The present value of the remaining payments due from NV Energy from September 2011 through May 2016 (the end of the 45-year term) is approximately \$282,000. The 1971 Agreement specifically contemplated a 45-year term and, as such, in the absence of a lump sum payment by NV Energy, PacifiCorp has not yet recovered its full investment.¹⁸

15. In response to NV Energy’s claim that the filing does not include the supporting evidence required for an initial rate schedule required by section 35.12 or for changes to an existing rate schedule required by section 35.13, PacifiCorp argues that it has provided the estimate of the investment and revenues it needs to recover under PacifiCorp Rate Schedule FERC No. 674.¹⁹ In addition, the August 3, 2011 Filing—Exhibit A to the Conformed Agreement—provides a basis for the charge proposed in the Conformed Agreement and an explanation of how that proposed charge was derived, which PacifiCorp contends is unchanged from the analogous provision in the 1971 Agreement.²⁰ PacifiCorp requests waiver of the remaining portions of the requirements in section 35.12(b) concerning the submission of other cost support, because it states that such other information is irrelevant to the proposed filing.²¹ According to PacifiCorp, the Commission has granted waiver of the filing requirements in section 35.12(b) on similar

¹⁶ PacifiCorp Answer at 5.

¹⁷ *Id.* at 6-7.

¹⁸ *Id.* at 11.

¹⁹ *Id.*

²⁰ *Id.* at 13.

²¹ *Id.*

grounds.²² PacifiCorp indicates that it did not provide a redlined version of the Conformed Agreement in the August 3, 2011 Filing, as required by Section 35.13, because the agreement was filed as a new rate schedule.

16. PacifiCorp argues that NV Energy provides no basis for its refund request. PacifiCorp states that it is not proposing the retroactive application of a new rate or *any* substantive modification to the terms and conditions related to the recovery of its investment as set forth in the 1971 Agreement. PacifiCorp contends that granting a full refund of any payments made since 2000 would amount to a windfall to NV Energy and an abrogation of obligations that were freely undertaken and agreed to by both parties 40 years ago.²³

17. NV Energy objects to PacifiCorp using its answer to satisfy some portions of Section 35.12, and opposes PacifiCorp's waiver request of information deemed "irrelevant to the proposed filing." NV Energy explains that a filing utility must include the information identified under 18 C.F.R. § 35.12 or 18 C.F.R. § 35.13 (whichever is applicable) in the section 205 filing (i.e., the August 3, 2011 Filing). According to NV Energy the cases cited in the PacifiCorp answer do not support its waiver request, because both orders address situations where it would be difficult or impossible to estimate *future* events and costs, unlike the *prior period* costs that PacifiCorp seeks to recover here.

18. NV Energy argues that whether the Commission views the August 3, 2011 Filing as "initial filing" or not, the filing is deficient, and the Commission should reject it. According to NV Energy, the Commission has "held that an initial rate filing is one that provides for a new service to a new customer, and that both the service and the customer must be new."²⁴ NV Energy declares that if the August 3, 2011 Filing involves a new service to a new customer, then NV Energy declines to take this new service, and, as NV Energy explained in its protest, a public utility cannot force an entity to take a service it does not want.²⁵ NV Energy adds that if the PacifiCorp's August 3, 2011 Filing "proposes to supersede, cancel or otherwise change any of the provisions of a rate schedule, tariff, or service agreement required to be on file with this Commission," then it "shall be filed as a change in rate in accordance with § 35.13."²⁶ As such, NV Energy

²² *Id.* at 13 (citing *Rockingham Power, LLC*, 93 FERC ¶ 61,310 (2000); *Entergy Servs., Inc.*, 91 FERC ¶ 61,149 (2000)).

²³ *Id.* at 15-16.

²⁴ NV Energy Answer at 4-5 (citing *Northeast Utilities Service Co.*, 50 FERC ¶ 61,266, at 61,837 (1990)).

²⁵ NV Energy Protest at 10.

²⁶ 18 C.F.R. § 35.1(c) (2011).

argues that PacifiCorp must include the cost of service data required by 18 C.F.R. § 35.13 for amended filings²⁷ and neither the August 3, 2011 Filing nor the PacifiCorp answer includes such data.

19. Under section 205 of the FPA, all jurisdictional rates must be filed with the Commission in a timely manner. In many cases, the Commission has stated that the statutory notice and filing requirement is not to be taken lightly, as a mere “procedural requirement” and that “administrative error” is not an excuse for failure to do so.²⁸ PacifiCorp does not dispute that on July 1, 2003, it filed a notice of cancellation of Rate Schedule FERC No. 267, which “had the inadvertent effect of cancelling the entire Rate Schedule No. 267.”²⁹ The Commission accepted the PacifiCorp termination filing, and the effect of such Commission acceptance was that there was no agreement on file covering the matters in the 1971 Agreement.³⁰ Nevertheless, it appears from the record in this proceeding that the parties behaved as if certain provisions of the 1971 Agreement remained in effect despite the fact that it was not on file. For example, both parties have continued to operate for approximately 11 years under the 1971 Agreement (other than the power purchase provisions), i.e., PacifiCorp’s transmission function has continued to bill NV Energy pursuant to the terms of the agreement and NV Energy has continued to pay those bills. We find that PacifiCorp was required by statute and our precedent to have an agreement on file covering such matters from the time it terminated the 1971 Agreement until the effective date of the Conformed Agreement.³¹ In addition, PacifiCorp has identified no extraordinary circumstances that would justify waiving the prior notice requirement. Accordingly, we will require PacifiCorp to refund the time value of payments it collected related to this transaction from April 1, 2000 to October 2, 2011. Consistent with Commission precedent, we limit the time value

²⁷ See, e.g., *Pacific Gas & Elec. Co.*, 95 FERC ¶ 63,022 (2001) (finding the filing amended an existing relationship and therefore “required the filing of detailed cost of service data under 18 C.F.R. § 35.13 to assure that jurisdictional customers will not be overcharged”); *Northeast Utilities Serv. Co.*, 50 FERC at 61,837.

²⁸ *Central Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, *passim*, *reh’g denied*, 61 FERC ¶ 61,089 (1992); *New England Power Co.*, 76 FERC ¶ 61,209, at 62,060 (1996); *Northeast Utilities Service Co.*, 76 FERC ¶ 61,237, at 62,151 (1996); and *Illinois Power Co.*, 75 FERC ¶ 61,269, at 61,878 (1996).

²⁹ PacifiCorp Filing Letter at 2.

³⁰ PacifiCorp, Docket No. ER03-1020-000 (2003) (delegated letter order), *supra* n.2.

³¹ *PacifiCorp*, 60 FERC ¶ 61,292, at 62,036 (1992) (“We cannot allow utilities such as PacifiCorp to evade their statutory filing responsibilities by operating under unfiled . . . rather than filed agreements.”).

refunds to ensure that PacifiCorp will be returning to NV Energy only the time value of money that it was never authorized to receive, with a floor to protect it from operating at a loss. Accordingly, we will direct PacifiCorp to make such refund to NV Energy within 30 days of the date of the issuance of this order, and to make a refund report to the Commission, within 60 days of the date of the issuance of this order, stating the amounts that it has refunded to NV Energy.³²

20. Accordingly, the Commission finds that under section 205(d) of the FPA, the Conformed Agreement is effective October 2, 2011.³³

By direction of the Commission.

Kimberly D. Bose,
Secretary.

³² *Carolina Power & Light Co.*, 87 FERC ¶ 61,083, at 61,357 (1999); *Florida Power & Light Co.*, 98 FERC ¶ 61,276, at 62,151 (2002).

³³ *Central Hudson Gas and Elec. Corp.*, 60 FERC ¶ 61,106, *reh'g denied*, 61 FERC ¶ 61,089 (1992).